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In The
Supreme Court of the United States
October Term, 1988
No. 88-941

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CRAWFORD PAINTING & DRYWALL COMPANY,
Petitioner,

v.

J. W. BATESON, INC.,
Respondent.

--o--

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF THE ASSOCIATED SPECIALTY CONTRACTORS, INC. AND THE PAINTING AND DECORATING CONTRACTORS OF AMERICA IN SUPPORT OF PETITION FOR CERTIORARI

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ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

MOTION OF THE ASSOCIATED SPECIALTY CONTRACTORS, INC. AND THE PAINTING AND DECORATING CONTRACTORS OF AMERICA FOR LEAVE TO FILE BRIEF AMICI CURIAE

COME NOW the Associated Specialty Contractors Inc. ("ASC") and the Painting and Decorating Contractors of America ("PDCA"), through counsel, pursuant to the rules of this Court, and respectfully move the Court to grant them leave to

file a brief, submitted herewith, as amici curiae, in support of the Petition For Writ of Certiorari filed by Petitioner in the above-captioned cause, and in support of a reversal of the judgement appealed from herein; and, in support of this motion, show as follows:

1) ASC is an organization made up of national associations of construction specialty contractors. Its affiliates represent approximately 166,000 business establishments with annual sales of $80 billion and 1,459,000 employees. PDCA is a national trade association representing leading paint and drywall contracting companies throughout the United States, with over 250 local chapters as well as 32 regional councils. These associations represent the interests of over 100,000 businesses engaged in public and private contracting. The decision rendered in

this cause by the United States Court of Appeals for the Fifth Circuit will have a profound and adverse impact upon the construction industry in general and, in particular, upon the right of subcontractors to recover just compensation for their labor on federal construction projects. Moreover, applicants' interest reflects the manifest concern of the construction industry in issues affecting or restricting the application of the Miller Act, 40 U.S.C. § 270a - 270d.

2) Applicants' brief as amici curiae, would be of particular assistance to the Court in this cause, in that:

(a) The Petitioner is insolvent, and thus lacks the financial means to prepare and reproduce an exhaustive brief on the issues. Respondent has expressly

waived its right to file a brief in response to the Petition for Writ of Certiorari. Thus, unless amici curiae are permitted to file a brief addressing the issues arising out of the decision from which the Petition for Writ of Certiorari is requested, this Court may be deprived of a complete presentation of the issues supporting the grant of the Petition for Writ of Certiorari.

(b) The issues involved in this appeal concern not only the parties and applicants, but are also of considerable public interest and import, and it is therefore of the utmost importance that Petitioner's position be developed and presented fully.

3. Applicants' request for written consent for filing of a brief amici curiae was granted by Petitioner, but

denied by Respondent. A copy of Petitioner's written consent is submitted herewith.

Wherefore, applicants pray that this Court grant them leave to file a brief amici curiae in order to present these issues.

Dated: January __, 1989.

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QUESTIONS PRESENTED

1. WHETHER THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT DEPARTED FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS BY PERMITTING A PRIME CONTRACTOR ON A FEDERAL CONSTRUCTION PROJECT TO DEPRIVE A SUBCONTRACTOR OF ITS FEDERAL MILLER ACT RIGHTS?

2. WHETHER THE DECISION OF THE COURT OF APPEALS, BY EXPRESSLY SANCTIONING THE DECEPTIVE ACTS OF A PRIME CONTRACTOR, IMPERILS THE ABILITY OF SUBCONTRACTORS TO RECOVER JUST COMPENSATION UNDER THE MILLER ACT, AND FOSTERS THE VERY HARDSHIPS WHICH THE MILLER ACT WAS INTENDED TO CORRECT?

3. WHETHER THE COURT OF APPEALS DEPARTED FROM ESTABLISHED PRECEDENT OF THE STATE OF TEXAS AND THE FEDERAL COURTS, AND CREATED A CONFLICT AMONG THE CIRCUITS, BY IMPROPERLY APPLYING A "NO DAMAGES FOR DELAY" CLAUSE TO PRECLUDE PETITIONER'S RECOVERY?

4. WHETHER THE COURT OF APPEALS DEPARTED FROM THE USUAL AND ACCEPTED COURSE OF JUDICIAL PROCEEDINGS BY MISCHARACTERIZING ALL OF PETITIONER'S DAMAGES AS "DELAY DAMAGES" TO PRECLUDE RECOVERY?

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STATEMENT OF INTEREST

The Associated Specialty Contractors, Inc.

The Associated Specialty Contractors, Inc., (ASC) is an "umbrella" organization of eight national associations of construction specialty contractors, whose combined membership totals about 25,000 firms. The member associations are the Mason Contractors Association of America, the Mechanical Contractors Association of America, Inc., the National Association of Plumbing, Heating and Cooling Contractors, the National Electrical Contractors Association, Inc., the National Insulation Contractors Association, the National Roofing Contractors Association, the Painting and Decorating Contractors Association of America, and the Sheet Metal and Air Conditioning Contractors National Association, Inc. All chapters, local and

regional affiliates and contractor members of the affiliated associations are regarded as affiliates of ASC, but ASC's communication with them is through the national associations.

The segments of the industry represented by ASC affiliates, as reported in the 1982 Census of Construction Industries, consist of about 166,000 business establishments with annual sales of $80 billion and 1,459,000 employees.

Painting and Decorating Contractors of America

Painting & Decorating Contractors of America (PDCA) is a national trade association representing leading paint contracting firms throughout the United States. The association was founded in 1884 by businessmen in the painting industry who decided that, through communi-

cation and cooperation, mutual opportunities could be broadened, and mutual problems could be effectively solved. This philosophy of cooperation still continues. While membership in the Association is totally voluntary, those who belong have a position of leadership and a voice in the industry. PDCA is comprised of 32 regional councils, over 250 local chapters and 3200 member firms.

COMBINED INTERESTS

Through their appropriate officers and representatives, the ASC and PDCA have each authorized participation in this case as Amicus Curiae. This Brief is filed with the written consent of Petitioner only.

The ASC and PDCA are concerned with this action because the decision in this

case will have immediate effect on similar cases that may now be pending throughout the country as well as on the development of important legal doctrine relating to the rights of subcontractors on federal construction projects.

The ASC and PDCA file this Brief in Support of Petitioner's position that the decision of the Court of Appeals has so far departed from the usual and accepted course of judicial proceedings as to call for the exercise of this Court's powers.

The ASC and PDCA also take the position that the decision of the Court of Appeals permits prime contractors on federal construction projects to deprive subcontractors of their federal Miller Act rights. See 40 U.S.C. §§ 270a-270d. The ASC and PDCA further contend that the Court of Appeals departed from established precedent of the State of Texas

and the federal courts, and has created a conflict among the circuits, by improperly construing and applying a "No Damages For Delay" clause typically found in construction contracts to entirely preclude petitioner's recovery.

STATUTORY PROVISIONS

The provisions of 40 U.S.C. §§ 270a-270d are set forth in the Appendix.

STATEMENT OF THE CASE

A. Introduction and Overview

In 1976 the Army Corps of Engineers (the "Corps") awarded a $64.9 million prime contract to the Respondent, J.W. Bateson Company, Inc. ("Bateson"). The prime contract required Bateson to perform renovation and construction work at Wilford Hall, a U.S. Air Force Hospital in San Antonio, Texas. In 1977, Bateson subcontracted with the Petitioner, Crawford Painting & Drywall Company ("Crawford") to complete the drywall work.

Originally, Crawford was to complete its drywall work in four years, by 1981. As a result of change orders issued by the Corps, and Bateson's failure to coordinate the project, the project fell behind schedule. In 1979, in exchange

for relief from liquidated damages against it for numerous delays on the project, Bateson secretly entered into an agreement with the Corps to rephase and extend the project by 2 years. The rephasing agreement, Modification P00253, also contained language that released the Corps from liability to Bateson and its subcontractors for delays encountered prior to March 2, 1979. Bateson concealed P00253 and its release language and led Crawford and the other subcontractors to believe that they would recover their increased costs from the Corps.

In 1982, while concealing the rephasing modification and its release, Bateson misrepresented to Crawford and the subcontractors that they could ultimately recover from the Corps all of their increased costs resulting from delay.

Bateson induced Crawford to enter into a "Liquidation Agreement", whereby Crawford agreed to submit its claims for delay and other increased costs to the Corps, and further agreed to waive all rights to pursue those claims against Bateson except for the right to collect from Bateson any monies recovered from the government on Crawford's behalf.

It was not until August of 1984, after Crawford's federally granted right of action under the Miller Act had expired, see 40 U.S.C. § 270a-270d, that the existence of P00253 and Bateson's release was first discovered by Crawford.

The Corps relied on the release language in P00253 and refused to pay the claims of any subcontractors, including Crawford, for the period covered by the release. As a result, Crawford became

insolvent and the business ceased operations in December 1984.

B. Bateson's Execution And Concealment Of P00253 And Its Release

In the spring of 1979, Bateson secretly entered into a bilateral agreement with the Corps which substantially modified the terms of the prime contract between Bateson and the Corps. Under the agreement, designated by the parties as "P00253," the work on the project was rephased and resequenced and the completion date was extended by approximately two (2) years. (R. V 369, 377-84; VI 157-59, 167-69; II 149-61; P. Exs. 8, 15, 88, 145; Jury Interrogatory Numbers ("Inter. Nos.") 3(7), (9), (11), (23)). The agreement allowed Bateson to avoid the threatened imposition of $750,000 in liquidated damages by the Corps. In exchange, the agreement contained an

attached list of 166 contractual modifications issued prior to the date of the execution of P00253, and contained language which released the Government from any liability for direct and indirect costs incurred by Bateson and its subcontractors as a result of P00253 and the 166 modifications. (P. Exs. 8, 15).

Three months later, in July of 1979, Bateson sent a letter ("the letter") to the Corps which purported to reserve the right of Bateson and its subcontractors to recover the costs of up to 168 days of the delay resulting from P00253. There was no reservation of rights to recover direct costs, nor for the balance of the two year period of delay, brought about by P00253. (P. Exs. 8, 13, 88, 377B). The Corps took the position, and informed Bateson, that the letter did not alter the parties' prior agreement that P00253

released the government from any liability for pre-1979 claims.

Bateson concealed its execution of the agreement and its release language from its subcontractors throughout the duration of the project. Bateson also concealed from the subcontractors the letter and the Corps' determination that P00253 constituted a release of claims.

C. Bateson's Request To The Corps That All Time Extensions Be Kept Secret

Bateson also solicited, and obtained, the assistance of the Corps in keeping P00253 and all other time extensions granted by the Corps secret from the subcontractors. (R. V 323-25, 342-45; P. Exs. 471, 472).[1] This was in

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1/ Bateson directed the Corps not to inform any subcontractors of time extensions. Lee Paul, a Corps official, authored a memo concerning

(Footnote 1 Continued on Next Page)

furtherance of Bateson's long-standing policy of keeping all time extensions secret from subcontractors.[2] Bateson also

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(Footnote 1 Continued From Previous Page) Bateson's request that the Corps keep time extensions secret from subcontractors. Bateson also refused to allow subcontractors to be present when it negotiated time extensions with the Corps. (R. V 323-25; VII 63-65; P. Ex. 472, 487, 488; Inter. No. 3(15)). Official government documents reflect that Bateson deliberately concealed the true schedule from the subcontractors. Jim Armstrong, Resident Engineer of the Corps, kept a project diary which contains express references to "Bateson's secret schedule." (R. V 342-45, 414-15, 418-19; P. Ex. 471; Inter. No. 3(3).

2/ A wealth of evidence supports the jury's multiple findings that Bateson actively concealed information from Crawford. John Stanley, Bateson's Vice President in charge of construction, testified concerning the Bateson policy of keeping all time extensions secret from subcontractors. He admitted that the purpose of the policy was to prevent subcontractors from exercising independent judgment concerning their labor forces and job progress. (R. VII 100-14).

concealed the Corps' position that P00253 released the Corps from pre-1979 subcontractor claims (Inter. Nos. 3(9), 17); 5(A)), even though Bateson was well aware of the Corps' position. (R. V 432-33; 454-55; VI 155-65; 271-272; VII 55-56).[3]

D. In 1982, Based On False Information Provided By Bateson, Crawford Entered Into The "Liquidation Agreement"

In 1982, Bateson held a series of meetings in which it encouraged Crawford and the other subcontractors to prepare claims to the Corps for additional compensation for problems encountered on the

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3/ Bateson's Project Manager, Mr. Ray Higgins, acknowledged that he had been informed of the Corps' position concerning the release in April of 1979 and again in December of 1983, after execution of the liquidation agreement; yet Bateson did not inform Crawford of the Corps' position. (Inter. Nos. 3(9), (17); 5(A); R. II 149-52; III 368; IV 146-47; VII 35-36, 40).

project (R. II 112-17; P. Ex. 458). Bateson told the subcontractors that the Corps was responsible for the project delay and mismanagement, and encouraged the subcontractors to enter into a form of agreement which is in widespread use throughout the construction industry, whereby the claims of subcontractors and the prime contractor are consolidated into a joint claim to the government. As part of the agreement, referred to by the parties as a "Liquidation Agreement," Crawford agreed to pursue its claims through Bateson against the Corps and to waive its rights to pursue those claims directly against Bateson. (P. Ex. 84). When Crawford executed the agreement, Bateson had not disclosed to Crawford the existence of P00253 and its release (R. II 123, Inter. Nos. 3(11), (13)), even though the majority of Crawford's increa-

sed costs arose prior to 1979, the period covered by the release. However, the Liquidation Agreement recognized "the relationship of trust and confidence" between Crawford and Bateson and required that they "fully, completely and without reservation share all information and records relating to the claim", so that an accurate and complete claim presentation might be made. (R. II 122, P. Ex. 459). Bateson misrepresented to Crawford that it had shared all pertinent information concerning the claim (Inter. No. 3(13)).

Had Crawford known of P00253, its release language, and the Corps' position with regard thereto, it would have had the option of pursuing its claims under the Miller Act, 40 U.S.C. §§ 270a-270d.[4]

4/ Crawford's counsel, Mr. Kerry Roach, testified that if he had known that
(Footnote 4 Continued on Next Page)

Unaware of the rephasing and release, Crawford used the original schedule, not the rephased schedule, to prepare its claim. Bateson submitted Crawford's original claim and that of other subcontractors on October 15, 1982. In 1984, because of P00253, Bateson agreed with the Corps that it was not entitled to compensation for increased labor, lost efficiency or delay-related expenses occurring prior to January, 1980. (R. II 140-43; P. Ex. 22). Bateson agreed to these limits without consulting Crawford,[5]

(Footnote 4 Continued From Previous Page) Bateson had executed P00253 and its release, he would have advised Crawford to pursue other remedies, including litigation. (R. VIII 21-22).

5/ The establishment of the earliest compensable delay period of January 1980 particularly damaged Crawford because its work most severely was affected by increased labor costs and delays encountered prior to 1980. (P. Exs. 15, 377B).

and sent a letter to the subcontractors directing them to revise their claims to include only costs and delays that arose after January 1980 (R. II 140-43; P. Ex. 22).

In response to these developments, Crawford began to prepare its revised claim. It was not until August 20, 1984, after Crawford's Miller Act rights had expired, that Crawford first learned of P00253 and Bateson's release. At that time, Corps representatives told Mr. Johnny Crawford that the original claim was submitted on the wrong basis because it included claims which were released by P00253. Corps representatives also informed Mr. Crawford that the modification deleted all compensable time prior to January 1980.

Crawford submitted its revised claim to Bateson in September of 1984. Bateson

stalled the certification and submission of the claim to the Corps until February of 1986. In October of 1986, the Corps denied Bateson's certified claim submitted on behalf of Crawford based primarily upon the release of claims executed by Bateson in P00253. (R. VI 200-01, 221).[6]

By the end of 1986, Mr. W.T. Crawford, Sr. had lost his business of 50 years, extensive personal assets, several hundred thousand dollars in certificates of deposit and was left with a debt of

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6/ At trial, Mr. Tomlinson, counsel for the Corps, testified that because of the release executed by Bateson in P00253, no subcontractor was paid for increased costs for delay occurring before the January 1980. As a result, the subcontractors recovered an average of only twenty cents for every dollar claimed. (R. VI 174-79). Several subcontractors suffered bankruptcy or financial reversals as a result. (R. IX 129-32).

over $1,500,000 plus accrued interest. (R. VI 4-9; III 320; P. Ex. 447).

SUMMARY OF ARGUMENT

The decision of the United States Court of Appeals for the Fifth Circuit allows prime contractors on federal construction projects to deprive subcontractors of their federal Miller Act rights. See 40 U.S.C. § 270a-270d. The Miller Act was enacted by congress to provide subcontractors on federal construction projects with a statutory remedy for obtaining payment for labor or materials furnished or supplied to a government project. Id.

Congress has explicitly recognized that prime contractors on federal construction projects often defraud and cheat subcontractors and other claimants out of their rights to receive payment

for labor or materials furnished or supplied by them on government projects. 79 Cong. Rec. 13383 (1935). Accord United States v. Daniel, Urbahn, Seelye and Fuller, 357 F. Supp. 853, 859 (N.D. Ill. 1973). Thus, the Miller Act was intended to protect subcontractors against coerced compromises of their claims and other unethical acts.

As a result of Bateson's intentional concealment of the contents of P00253, and its other wrongful acts, Crawford was deprived of its federal Miller Act rights. By expressly sanctioning Bateson's acts, the Court of Appeals has imperiled the right of all subcontractors to recover under the Miller Act thereby circumventing the express intent of Congress.

The United States Court of Appeals for the Fifth Circuit has also departed

from established state and federal precedent, and created a conflict among the circuits, by improperly construing and applying a "No Damages for Delay" clause typically found in construction contracts to entirely preclude recovery. The Court of Appeals failed to recognize that Bateson had an express contractual obligation to present to the Corps any claim for delays asserted by Crawford that were attributable to acts or omissions of the Corps. Bateson also impliedly warranted under the subcontract that it would preserve and protect Crawford's right of recovery of such damages.

When Bateson executed P00253, and surrendered the rights of its subcontractors to recover for delay and other impact costs from the government, it materially breached its subcontract with Crawford entitling Crawford to recover

those damages directly from Bateson. See generally Restatement (Second) of Contracts § 347 (1979). As the trial court noted, Bateson's wrongful breach of the Liquidation Agreement precludes its reliance upon the waiver provisions contained in the agreement. See, Sterling Projects, Inc. v. Fields, 530 S.W.2d 602, 606 (Tex. Civ. App. - Waco 1975).

Finally, the Court of Appeals has so far departed from the usual and accepted course of judicial proceedings, by mischaracterizing all of Crawford's damages as "Delay Damages" to preclude recovery, as to call for the exercise of this Court's power of supervision.

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT ALLOWS PRIME CONTRACTORS ON FEDERAL CONSTRUCTION PROJECTS TO DEPRIVE SUBCONTRACTORS OF THEIR FEDERAL MILLER ACT RIGHTS

A. The Miller Act Provides a Federal Cause of Action for the Protection of Subcontractors on Federal Construction Projects

The Miller Act, 40 U.S.C. § 270a-270d, provides subcontractors with a federal cause of action for the recovery of sums due for labor and materials furnished on federal projects. As this Court has recognized:

> The purpose of the Act is to protect persons supplying materials and labor for federal projects, and it is to be construed liberally in their favor to effectuate this purpose. F.D. Rich Co., Inc. v. United States ex rel. Industrial Lumber Co., Inc., 417 U.S. 116, 124 (1974)

Accord United States v. Avanti Constructors, Inc., 750 F.2d 759 (1984); See also Clifford F. MacEvoy Co. v. United

States ex rel. Tomkins Co., 322 U.S. 102, 107 (1944).

The Act requires prime contractors on federal construction projects to post a "payment bond", 40 U.S.C. § 270a(a), and gives a right to sue and to recover on the payment bond to:

> [e]very person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under section 270a of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or performed by him or material was furnished or supplied by him for which such claim is made....

40 U.S.C. § 270b(a).

The Act is "highly remedial in nature," and its terms should be liberally construed. J.W. Bateson Co. v. U.S. ex rel. Board of Trustees, 434 U.S. 586, 594 (1978).

1. The Miller Act Was Enacted to Ensure a Means of Recovery for Subcontractors and Material Suppliers on Federal Projects

The Miller Act was enacted in recognition of the fact that there is no contract, express or implied, between a subcontractor and the government. United States v. Blair, 321 U.S. 730 (1944); United States For Use of B's Co. v. Cleveland Electric Co., 373 F.2d 585 (4th Cir. 1967); Fanderlik-Locke v. United States for the Use of Morgan, 285 F.2d 939 (10th Cir. 1960). Thus, there is no procedure by which a claim of a subcontractor can be presented against the United States, except as it may become a claim of the prime contractor. A subcontractor has no standing before a government contracting officer or a Board of Contract Appeals, and no provision is

made for hearing of disputes between a prime contractor and a subcontractor. Fanderlik-Locke, 285 F.2d 939; accord Warrior Constructors, Inc. v. Harders, Inc., 387 F.2d 727, 729 (5th Cir. 1967).

In addition, mechanics liens, the traditional remedy of subcontractors and materialmen on private construction projects, do not attach to federal property. Thus, the Miller Act was enacted by Congress specifically to provide an alternative remedy to protect the rights of subcontractors and suppliers on federal construction projects. F.D. Rich, 417 U.S. 116, 122; accord United States v. C.J. Elec. Contractors, Inc., 535 F.2d 1326 (1st Cir. 1976).

2. One of the Primary Factors Leading to the Enactment of the Miller Act Was Bad Faith and Fraudulent Acts by Prime Contractors on Federal Construction Projects

In passage of the Miller Act, Congress explicitly recognized the prevalence of fraud and bad faith on the part of general contractors in the administration of federal construction projects. Senator Walsh stated:

> [T]he investigations conducted by the subcommittee of the Committee on Education and Labor showed a deplorable condition with reference to the way employees on public buildings were defrauded and cheated of their wages, and any measure that will tend to strengthen their rights and help them to secure their compensation is justified.

79 Cong. Rec. 13383 (1935). Accord United States v. Daniel, Urbahn, Seelye and Fuller, 357 F. Supp. 853, 859 (N.D. Ill., 1973).

The predecessor to the Miller Act, the Heard Act, Act of Aug. 13, 1894, Ch. 280, 28 Stat. 278, proved inadequate to combat the prevalence of contractor abuse and bad faith, with the result that subcontractors were either entirely deprived of, or forced to accept, unjust compromises of their claims:

> [I]t appears that claimants frequently find themselves under the necessity of choosing whether they will wait for years for their money or accept compromises which, if they do not involve greater loss, at least destroy the profitableness of the contract. Those in financial stringency, of course, have no choice but the latter alternative.

H.R. Rpt. No. 1263, 74th Cong., 1st Sess. 2 (1935). Thus, the Miller Act was intended to protect subcontractors against coerced compromises of their claims, and against the acts of unethical, as well as insolvent, contractors. See United

States v. Daniel, supra, 357 F. Supp. at 861.

B. As A Result Of Bateson's Concealment Of The Contents Of P00253 And Intentional Breaches Of Contract, Crawford Was Deprived Of Its Miller Act Rights

Notwithstanding the remedial purpose of the Act and the liberal construction to be afforded it, the Act contains important restrictions with which the party seeking to recover must comply. For example, and of particular concern in this case, the right of a subcontractor to sue under the Miller Act to obtain payment is limited in time. Such an action must be filed within one year after the last day on which the subcontractor or supplier provided labor or materials to be used on that particular project. Id. § 270b(b). Crawford's work on the project was completed on

January 18, 1983. (P. Ex. 15). Bateson completed the project 8 months later, on August 4, 1983. Crawford Painting & Drywall Co. v. J.W. Bateson Co., Inc. 857 F.2d 983 (5th Cir. 1988). Under the Miller Act, Crawford had until January of 1984 to file suit for recovery under the payment bond. However, as detailed above, the fraudulent acts of Bateson caused Crawford to forfeit its Miller Act rights. By expressly sanctioning Bateson's deceptive acts, the Court of Appeals has imperiled the right of all subcontractors to recover under the Miller Act, and has fostered the very hardships which the Miller Act was intended to correct.

C. The Decision Of The Court of Appeals Permits Prime Contractors On Federal Construction Projects To Withhold And Conceal Vital Project Information From Their Subcontractors.

In its answers to special interrogatories submitted under Rule 49, F. R. Civ. P., the jury made twenty-six (26) separate findings that Bateson concealed or withheld vital project information from Crawford and other subcontractors.[7] The jury found that Bateson's concealment and nondisclosures constituted fraud; breach of the liquidation agreement; breach of contract and negligence; and that as a result of the concealment,

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7/ (Inter. Nos. 3(2), (3), (4), (5), (6), (7), (8), (11), (13), (15), (17), (18), (23); 5(A); 7(D)(E)(F); 8(D)(E)(F); 13(D)(E)(F); 14(D)(E)(F)).

Crawford was fraudulently induced to postpone filing suit against Bateson.[8]

D. The Decision Of The Court Of Appeals Fosters The Very Hardships Which The Miller Act Was Intended To Correct

The decision of the Court of Appeals will have a substantial adverse impact on the rights of subcontractors on federal construction projects, by allowing the prime contractor on such projects to:

- Maintain secret schedules, and conceal project information from subcontractors; 857 F.2d at 985.
- Execute time extensions which extend subcontractor performance on the project by as much as 2 1/2 years, without prior notice to the subcontractors; See Id. at 986.
- Release or, at the very least, impair the right of subcontractors to recover the costs of

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8/ Fraud - Inter. No. 3; Breach of the Liquidation Agreement - Jury Inter. No. 5; Breach of Contract - Jury Inter. No. 7; Negligence - Jury Inter. No. 13; Fraudulent Inducement to Postpone Filing Suit - Inter. Nos. 8, 14.

delay and increased labor costs; Id.

- Conceal release agreements by the maintenance of secret schedules and through a company policy of nondisclosure of time extensions, despite contractual and fiduciary agreements to share information; Id.

- Misrepresent that it has made full disclosure to its subcontractors concerning claims against the government; Id., 986-87.

- Fail to disclose to, or to consult with, its subcontractors concerning $12 million worth of contract changes directly affecting their work, Id.

If the decision is allowed to stand, it will introduce elements of uncertainty, suspicion and bad faith in the dealings between prime contractors and their subcontractors on both private sector and federal construction projects. That result conflicts with the expressed intention of the Congress in its enactment of the Miller Act, that the right of

subcontractors to secure just payment for their labor should be strengthened. 79 Cong. Rec. 13383 (1935).

By depriving subcontractors of timely access to vital information, subcontractors will be unable to effectively protect their interests. In the absence of information concerning prime contractor agreements regarding time extensions, change orders, and releases/reservations of subcontractor claims, subcontractors may be compelled to accept compromises of their claims brought about by undisclosed negotiations between the government and its prime contractors. That is precisely the kind of hardship which the Miller Act was intended to correct. H.R. Rpt. No. 1263, 74th Cong., 1st Sess. 2 (1935).

II. THE COURT OF APPEALS IMPROPERLY APPLIED THE NO DAMAGES FOR DELAY CLAUSE IN CRAWFORD'S SUBCONTRACT TO PRECLUDE RECOVERY

A. The "No Damages For Delay" Clause Specifically Allowed Crawford To Recover Damages From Bateson For Delays Caused By The Corps

The "No Damages For Delay" Clause contained in Crawford's subcontract with Bateson distinguishes between delays for which the Corps is liable and other delays experienced at the project. The clause states:

> 9. Delays. Should the Subcontractor's performance of this subcontract be delayed by any acts of the Contractor, other subcontractors, or the Contractor's suppliers, or delayed by any acts or causes which would entitle the Contractor to an extension of time under the Contract Documents, the Subcontractor shall receive an equitable extension of time for the performance of this subcontract, but shall not be entitled to any increase in the subcontract price or to damages or additional compensation as a consequence of

> such delays, unless the Owner is liable and pays for such delays. The Contractor will pay the Subcontractor the amount allowed and paid by the Owner for the Subcontractor's delay. Within five days after the commencement of any delay caused by the Contractor, other subcontractors, or the Contractor's suppliers, the Subcontractor shall notify the Contractor in writing stating full details of the cause of alleged delay. The Subcontractor shall notify the Contractor in writing of any delays for which the Owner is responsible, in sufficient time so that its claim may be timely processed against the Owner administratively.

(P. Ex. 58) (emphasis added)

The Court of Appeals failed to recognize that Bateson had an express contractual obligation to present to the Corps any claims for delay asserted by Crawford that were attributable to acts or omissions of the Corps. Bateson also impliedly warranted under the subcontract that

it would preserve Crawford's right of recovery of such damages.

The jury made multiple findings that Bateson intentionally impaired Crawford's right to recover delay and other costs from the Corps. (Inter. Nos. 3 (7), (9), (11), (13), (17), (23)A and 5).[9]

The jury's findings were supported by substantial evidence, including the testimony of Mr. Tomlinson and Mr. Armstrong of the Corps. Mr. Tomlinson, legal coun-

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9/ The Courts of Texas and of multiple Federal circuits have recognized that a party's bad faith will prevent its reliance upon the clause. See United States Steel Corp. v. Missouri Pacific Railroad, 668 F.2d 435 (8th Cir. 1982), cert. denied, 103 S. Ct. 80 (1982); Shintech Inc. v. Group Constructors, Inc., 688 S.W.2d 144, 148 (Tex. App. 14 Dist. 1985); City of Houston v. R.F. Ball Const. Co., Inc., 570 S.W.2d 75 (Tex. Civ. App. 1978); E. C. Ernst, Inc. v. Manhattan Const. Co. of Texas, 551 F.2d 1026, 1029 (5th Cir. 1977), reh'g denied in part, granted in part, 559 F.2d 268 (5th Cir. 1977); cert. denied, 434 U.S. 1067 (1978).

sel for the Corps, testified that subcontractors recovered an average of only 20 cents for every dollar claimed because Bateson surrendered the rights of its subcontractors to recover for delay and other damages for the first 2 and 1/2 years on project in P00253.[10] Mr. Tomlinson also testified that Crawford's claims for increased compensation were denied as a result of Bateson's execution and surrender of rights in P00253.

Thus, it is manifest that Bateson materially breached its subcontract with

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10/ The release of claims language contained in P00253 is set forth, in its entirety, in Appendix E. Approximately five years after Bateson executed P00253, it entered into claims negotiations with the Corps and conceded that P00253 operated to release all claim rights of Bateson and its subcontractors for delay and impact costs resulting from acts or omission of the government occurring prior to January 1980.

Crawford when Bateson representatives executed P00253 and released the Corps from any liability for direct and indirect costs incurred by Bateson and its subcontractors as a result of P00253 and the 166 modifications referred to therein. (P. Exs. 8, 15).

B. The Court of Appeals Failed To Acknowledge That Bateson's Wrongful Breach Of The Liquidation Agreement Precludes Bateson From Relying Upon Crawford's Waiver Of Rights

The jury found that Bateson breached the Liquidation Agreement by failing to disclose in 1983 and 1984 that the Corps intended to enforce the release language contained in P00253 to the detriment of Crawford. (Inter. No. 5). The jury also specifically found that Bateson committed fraud in misrepresenting in the spring and fall of 1982 that it fully disclosed all relevant facts regarding the "omnibus

claim" to Crawford and, therefore, violated paragraph 1 of the Liquidation Agreement. (Inter. No. 3(13)). As the trial court noted in its judgment order dated January 22, 1987,[11] Bateson's wrongful breach of the Liquidation Agreement precludes its reliance upon the waiver provisions contained in the agreement. See Sterling, 530 S.W.2d at 606 (Tex. Civ. App. - Waco 1975). Therefore, Crawford was entitled to recover directly from Bateson, damages for delay caused by the Corps.

C. Bateson's Release Of Subcontractor Claims For Delay And Other Costs Under P00253 Is A Material Breach Of Its Subcontract With Crawford

The decision of the Court of Appeals is particularly onerous in this case because Bateson was obligated under the

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11/ Appendix C of Crawford's Petition for Writ of Certiorari

subcontract to pay to Crawford amounts allowed and paid by the government for delays caused by the Corps. The Court of Appeals failed to acknowledge that, when Bateson released the Corps from any liability for direct and indirect costs incurred by Bateson and its subcontractors as a result of P00253, Bateson materially breached its subcontract with Crawford. By executing P00253, Bateson extinguished Crawford's federally recognized right to recover from Bateson, by way of a pass-through claim, those damages incurred by it as a result of the acts and omissions of the Corps. Blair, 321 U.S. 737-38; See also Owens Corning Fiberglas Corp. v. United States, 419 F.2d 439, 454-455 (Ct. Cl. 1969).

D. Bateson, Having Extinguished Crawford's Right To Recover Damages From The Government By Way Of A Pass-Through Claim, Is Liable To Crawford For Those Damages Under A Breach Of Contract Theory

Bateson is liable to Crawford for those damages that Crawford would have been entitled to recover from the government but for the release that Bateson tendered to the Corps in connection with P00253. Restatement (Second) of Contracts § 347 (1979). It is difficult to imagine a factual and procedural setting in which the enforcement of a "No Damages For Delay" clause would be less appropriate. Yet the court enforced the clause, not only to set aside breach of contract damages, but also to set aside express findings of fraud by the jury.

If the decision is left to stand, it will introduce an element of uncertainty in what has heretofore been a settled

area of law. Moreover, those seeking to enforce the clause will be granted carte blanche to breach the implied convenant of good faith and fair dealing which inheres in every contract, and to resort to unethical and "intentional and malicious"[12] acts with impunity.

III. THE COURT OF APPEALS MISCONSTRUED PETITIONER'S DAMAGES, AND MISCHARACTERIZED THEM AS "DELAY DAMAGES"

The Court of Appeals reflected a fundamental misunderstanding of the damages incurred by Crawford as a result of the activities of Bateson on the project. In its decision, the Court erroneously found that all of Crawford's claims for damages stemmed from delay:

> It must be recognized that the only factor about this job which Crawford claims to have caused it damages was delay. Crawford has many complaints of omissions that

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12/ See Crawford, 857 F.2d at 985.

> led to delay. It may have suffered financial reverses as the result of the delay. But the critical factor and only factor that did the damage was delay.

857 F.2d at 986 (emphasis in the original).

The Court's ruling conflicts with (a) the nature of the damages claimed by Crawford; (b) the express damages found by the jury; and (c) the overwhelming weight of authority of other circuits concerning the nature of damages on a construction project.

A. The Court Misunderstood Crawford's Damages Claims

In its complaint before the court, and in its case-in-chief at trial, Crawford proved that Bateson failed to disclose $12,000,000 worth of mechanical and electrical changes which directly increased the scope of Crawford's work and

caused him to incur substantial additional direct and indirect costs. (Inter. Nos. 7(E), 13(E).

B. The Court's Mischaracterization Of Crawford's Damages As "Delay Damages" Contradicts Express Findings Of The Jury

The Court's decision disregards the jury's finding in Interrogatory No. 3(6) that "Bateson's concealment and failure to transmit the change to Crawford for pricing deleting electrical conduit from the concrete slab in spite of knowledge of major impact to Crawford's costs as a result of the change" constituted fraud. The Court also disregarded the jury's findings, in subpart (E) of Interrogatories Nos. 7 and 13, that Bateson breached its contract with Crawford by "failing to request that Crawford submit prices for changed work as change order requests from the Corps of Engineers affecting

Crawford's work were received by Bateson". The jury's findings in the foregoing interrogatories are in no wise limited to "delay" as found by the Court.

C. The Court's Mischaracterization Of All Damages As "Delay" Damages Conflicts With The Overwhelming Weight Of Authority Of The Various Federal Circuits

It is well settled that when additional labor hours are expended in performance of a contract due to one of the parties' acceleration, delay, or directive to perform work outside the scope of the contract, a subcontractor is entitled to recover its direct labor costs caused by such actions. See J.D. Hedin Constr. Co. v. United States, 347 F.2d 235, 246 (Ct. Cl. 1965); E.C. Ernst, Inc. v. Koppers Co., Inc., 476 F. Supp. 729, aff'd in part, rev'd in part, 626 F.2d 324, on remand 520 F. Supp. 830. In

Plaintiff's Exhibit 15, Crawford presented manloading charts, summaries and damages calculations which reflect the increased labor hours and costs that Crawford experienced on the project. In addition, Crawford presented extensive testimony that the increase in labor hours was directly caused by J.W. Bateson. Mr. Jim Armstrong, Resident Engineer for the Corps of Engineers, testified at length concerning Bateson-caused problems on the project. Mr. Johnny Crawford, Mr. Frank Sturgis, and Mr. Benito Garcia, employees of Crawford, provided testimony concerning the great increase in labor costs occasioned by Bateson's lack of coordination on the project. While it is true that these labor increases also caused delay, the court manifestly erred in characterizing all of these damages as "delay damages".

Courts have long recognized that alterations in the nature and schedule of the work can often result in a loss of efficiency in the work force of a contractor. Changes, delays, extra work orders and acceleration or deceleration orders can disrupt work continuity and impact anticipated labor productivity. These damages may include losses of efficiency for overtime work, see Luria Brothers & Co. v. United States, 369 F.2d 701 (Ct. Cl. 1966); multiple or larger crews than originally anticipated; see Paccon, Inc., ASBCA No. 7890, 65-2 BCA ¶ 4996 (1965); see also United States Steel, 668 F.2d 435, cert. denied; E.C. Ernst v. Koppers Co., Inc., 520 F. Supp. 830; stacking of trades, see J.D. Hedin, 347 F.2d 235; Lew F. Stillwell, Inc., ASBCA No. 9423, 1964 BCA ¶ 4128 (1964); Blake Constr. Co. v. C.J. Coakley, 431

A.2d 569 (D.C. App. 1981); and out of sequence performance, H. John Homan Co. v. United States, 418 F.2d 522 (Ct. Cl. 1969); Anderson Development Corp. v. Coastal States, 543 S.W.2d 402 (Tex. Civ. App. 1976); Paccon, Inc., ASBCA No. 7890, 65-2 BCA ¶ 4996 (1965). At trial, Crawford provided substantial evidence of each of these damages.

CONCLUSION

The petition for issuance of a writ of certiorari should be granted, and the decision of the U.S. Court of Appeals for the Fifth Circuit reversed.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

SAN ANTONIO DIVISION

CRAWFORD PAINTING AND DRYWALL COMPANY	*	
Plaintiff	*	
VS.	*	SA-85-CA-1082
J.W. BATESON COMPANY, INC.,	*	
Defendant	*	

INTERROGATORIES TO THE JURY

Interrogatory Number 1:

Do you find from a preponderance of the evidence that the Liquidation Agreement (Ex. 84) and the Lien Waiver Forms (Ex.B), waiving and releasing Bateson from any liability on any of plaintiff's claims, were signed by Crawford because of fraud by Bateson, as enumerated in the Instructions related to this issue?

Answer: "We do" or "We do not"

ANSWER: "We do not"

If you have answered Interrogatory Number 1 "we do not" then answer Interrogatory Number 2; otherwise, do not answer Interrogatory Number 2.

Interrogatory Number 2:

Do you find from a preponderance of the evidence that the Liquidation Agreement and the Lien Waiver Forms fully waived and released Bateson (except for such sums which may ultimately be received from the Corps of Engineers) or partially waived and released Bateson from liability in excess of what is recoverable from the Corps or for Corps caused problems, and that Bateson remains presently liable under the subcontract for wrongs the Corps committed?

Answer: "Full release" or "Partial release"

ANSWER: "Partial release"

If you have answered Interrogatory Number 2 "full release", do not answer Interrogatory Numbers 3-4 and 7-23; instead, answer only Interrogatory Numbers 5, 6, 24 and 25.

Interrogatory Number 3:

For each allegation of fraud listed below, you must answer three questions. In the first blank, you must find from a preponderance of the evidence whether the act or omission constituted fraud. In the second blank, you must find from a preponderance of the evidence whether the fraud, if any, was a proximate cause of damages to plaintiff. Plaintiff has the burden of proof on these first two questions. Defendant has the burden of proof on the last question. In the third blank, you must find from a preponderance of the evidence whether plaintiff knew or should have known of the act or omission

or of the fact of injury or damage because of the act or omission, prior to March 28, 1983. Whether Bateson committed any of acts or omissions listed, is for you the jury to determine.

Answer: "We do" or "We do not"

	Fraud	Proximate Cause	Knowledge
1. Bateson's concealment and nondisclosure of Corps letters concerning Bateson's decision to change prime contract and delete electrical conduit from slab.	"We do not"	"We do not"	"We do not"
2. Failure to send PRs to Crawford for pricing when Bateson knew such PRs affected Crawford's cost and time for performance.	"We do"	"We do"	"We do"
3. Maintenance of secret schedules.	"We do"	"We do"	"We do not"

4. Failure to send to Crawford, or any subcontractor, time modifications to the prime contract.	"We do"	"We do"	"We do"
5. Following a Company policy (contrary to Clause 6 of the subcontract) of keeping all time modifications secret from the subcontractors.	"We do"	"We do"	"We do"
6. Bateson's concealment and failure to transmit the change to Crawford for pricing deleting electrical conduit from the concrete slab in spite of knowledge of major impact to Crawford's costs as a result of the change.	"We do"	"We do"	"We do not"
7. Bateson's concealment and failure to transmit the total rephasing and extension of the project in PR 490 to Crawford for pricing.	"We do"	"We do"	"We do"

8. Bateson's misrepresentation by Ray Higgins that Bateson would bury Crawford in paper when Crawford requested in 1977-1978 that Crawford be provided with all changes on the project.	"We do not"	"We do not"	"We do"
9. Concealment of content of P00253 including release language.	"We do"	"We do"	"We do not"
10. Bateson's misrepresentation in the spring of 1982 of 563 compensable days formally granted by the Corps of Engineers.	"We do not"	"We do not"	"We do"
11. Concealment and nondisclosure in 1982 claim meetings and letters of P00253 contents including release language impairing Crawford's right to recovery.	"We do"	"We do"	"We do not"

12. Bateson's misrepresentation to Crawford of the basis on which the delay claim should be prepared in 1982.	"We do not"	"We do not"	"We do"
13. Bateson's misrepresentations in the spring and fall of 1982 that Bateson made full disclosure with respect to all the facts relevant to the claim.	"We do"	"We do"	"We do not"
14. Bateson's abandonment of the CPM Schedule.	"We do not"	"We do not"	"We do not"
15. Bateson's direction to the Corps of Engineers to conceal time modifications on the project from the subcontractors.	"We do"	"We do"	"We do"
16. Bateson's misrepresentation of 664 compensable days, in 1983, formally granted by the Corps of Engineers.	"We do not"	"We do not"	"We do"

17. Concealment and nondisclosure to subcontractors in 1983 of Corps of Engineers position in negotiations on delay claim that all claims were cut off before the spring of 1979 because of Bateson's execution of P00253.	"We do"	"We do"	"We do not"
18. Intentional abandonment by Bateson of the basis of the delay claim which the subcontractors had been advised constituted the proper basis for a claim.	"We do"	"We do not"	"We do not"
19. Concealment by Bateson of its abandonment of the basis previously represented to the subcontractors as the proper basis of claim.	"We do not"	"We do not"	"We do not"

20. Intentional breach of trust by Bateson by entering into an agreement, without consultation with Crawford, with the Corps of Engineers to limit compensation to four compensable delay periods after January 23, 1980 in Lady, March 15, 1984 letter.	"We do not"	"We do not"	"We do not"
21. Fraudulent representation by Bruce Lady to W.T. Crawford, Johnny Crawford and Kerry Roach in the spring of 1984 that Crawford was bound by the Agreement detailed in the March 15, 1984 Lady letter.	"We do not"	"We do not"	"We do not"
22. Misrepresentation by Bateson's representatives at the August 16, 1984 meeting with Crawford, Bateson and the			

Corps of Engineers that no rephasing of the contract ever occurred.	"We do not"	"We do not"	"We do not"
23. Bateson's concealment of the contents of P00253, including the release language, until August 30, 1984.	"We do"	"We do"	"We do not"
24. Bateson's concealment and nondisclosure of P00478R including confirmation of P00253 release.	"We do not"	"We do not"	"We do not"
25. Intentional breach of trust by Bateson's refusal to certify Crawford's revised September 1984 claim until February 1986.	"We do not"	"We do not"	"We do not"
26. Bateson's false representation of its intention to provide hoisting facilities to Crawford.	"We do not"	"We do not"	"We do"

27. Intentional breach of trust in execution of P00478R.	"We do not"	"We do not"	"We do not"
28. Bateson's intentional impairment to Crawford's right to recovery through communications to the Corps of Engineers that Crawford's revised claim was based upon wild theories.	"We do not"	"We do not"	"We do not"
29. Intentional concealment and refusal to provide Crawford with the contents of the PR log until 1986.	"We do not"	"We do not"	"We do not"
30. Intentional concealment of the completion dates from IJ trade sorts sent to Crawford by Bateson	"We do not"	"We do not"	"We do not"

31. Concealment and nondisclosure of Corps of Engineers determination not to withhold retention on Wilford Hall project.	"We do not"	"We do not"	"We do not"
32. Concealment, throughout the life of the project, of the true number of compensable days.	"We do not"	"We do not"	"We do not"
33. Misrepresentation of the number of compensable days in document entitled "Time Extension by Phase" handed out at meeting in spring of 1982.	"We do not"	"We do not"	"We do not"

If you have found that Bateson committed any of the acts or omissions listed above, and if you have found that such act or omission constituted fraud and was a proximate cause of damage to plaintiff, then answer Interrogatory Number 4; otherwise, do not answer Interrogatory Number 4.

Interrogatory Number 4:

What amount of money, if paid now in cash, do you find from a preponderance of the evidence would compensate plaintiff for the damages, if any, it sustained as a proximate result of defendant's fraud? Answer in dollars and cents or zero.

ANSWER: $2,383,333.33

Interrogatory Number 5:

Do you find from a preponderance of the evidence that Bateson breached the Liquidation Agreement, that such breach was a proximate cause of damage to plaintiff, and that such damage was a reasonably foreseeable result of the breach?

Whether Bateson committed any of these acts or omissions is for you the jury to determine.

Answer: "We do" or "We do not"

	Breach	Proximate Cause	Reasonably Foreseeable
A) Failing to disclose in 1983 and 1984 that the Corps of Engineers sought to limit recovery by Crawford as a result of the release language contained in P00253.	"We do"	"We do"	"We do"
B) By agreeing without consultation with Crawford to limit any recovery by Crawford for compensable delays to the four compensable periods after January 23, 1980 specified in the March 15, 1984 Lady letter. (Ex.22)	"We do not"	"We do not"	"We do not"
C) By refusing to properly certify Crawford's revised claim from October 1984 through February 1986.	"We do not"	"We do not"	"We do not"

If you have found that, in any of the above respects, Bateson breached the Liquidation Agreement, that such breach was a proximate cause of damage to plaintiff, and that such damage was a reasonably foreseeable result of the breach, then answer Interrogatory Number 6; otherwise do not answer Interrogatory Number 6.

Interrogatory Number 6:

What amount of money, if paid now in cash, do you find from a preponderance of the evidence would compensate plaintiff for the damages, if any, it sustained as a proximate result of defendant's breach of the Liquidation Agreement?

You are instructed that the damages must be a reasonably foreseeable result of the breach.

Answer in dollars and cents or zero.

ANSWER: $30,000.00

Interrogatory Number 7:

For each allegation of breach of contract listed below you must answer three questions. Plaintiff has the burden of proof on all three questions. In the first blank you must find from a preponderance of the evidence whether the act or omission constituted a breach of contract. In the second blank you must find from a preponderance of the evidence whether the breach of contract, if any, was a proximate cause of damage to plaintiff. In the third blank you must find from a preponderance of the evidence whether such damage was a reasonably foreseeable result of the breach. Whether Bateson committed any of the acts or omissions listed is for you the jury to determine.

Answer: "We do" or "We do not"

	Breach	Proximate Cause	Reasonably Foreseeable
A) Failing to schedule the work so that Crawford could complete its work on or before its contractual deadline;	"We do not"	"We do not"	"We do not"
B) Failing to coordinate the work of Crawford with the work of other subcontractors;	"We do"	"We do"	"We do"
C) Failing to make work areas available to Crawford so that Crawford could perform its work in a logical sequence and in conformity with the schedule;	"We do not"	"We do"	"We do not"
D) Failing to keep Crawford timely informed of all scheduling, rephasing and changes;	"We do"	"We do"	"We do"

E) Failing to request that Crawford submit prices for changed work as change order requests from the Corps of Engineers affecting Crawford's work were received by Bateson;	"We do"	"We do"	"We do"
F) Failing to consult with Crawford on changes which affected Crawford's work and failing to keep Crawford apprised of negotiations with the Corps for time or money relating thereto;	"We do"	"We do"	"We do"
G) Failing to pay Crawford for extra work and change order work;	"We do not"	"We do not"	"We do not"

H) Failing to make progress payments to Crawford covering the work performed;	"We do not"		"We do"	"We do not"

If you have found that, in any of the above respects, Bateson breached the contract, that such breach was a proximate cause of damage to plaintiff, and that such damage was a reasonably foreseeable result of the breach, then answer Interrogatory Numbers 8 and 9; otherwise, do not answer Interrogatory Numbers 8 and 9.

Interrogatory Number 8:

As to each element for which you have found breach of contract, proximate cause and reasonable foreseeability, you must find by a preponderance of the evidence whether the act or omission occurred prior to March 28, 1981 and, if it did,

whether Bateson fraudulently concealed from Crawford the facts upon which the particular breach is based or whether Bateson induced Crawford to postpone the filing of this lawsuit until more than four years after the occurrence of the particular breach. For Bateson to be guilty of fraudulent concealment, it must have had actual knowledge of the facts concealed and a fixed purpose to conceal the breach. For Bateson to have induced Crawford to postpone the filing of this lawsuit, Bateson must have misrepresented facts upon which Crawford reasonably relied in postponing legal action. Defendant has the burden of proving whether the act or omission occurred prior to March 28, 1981. Plaintiff has the burden of proving that Bateson fraudulently concealed the breach or induced Crawford to postpone the filing of this lawsuit.

Answer: "We do" or "We do not"

	Prior to March 28, 1981	Fraudulently Concealed or Induced
A)	_____	_____
B)	"We do"	"We do not"
C)	_____	_____
D)	"We do"	"We do"
E)	"We do"	"We do"
F)	"We do"	"We do"
G)	_____	_____
H)	_____	_____

Interrogatory Number 9:

What amount of money, if paid now in cash, do you find from a preponderance of the evidence would compensate plaintiff for the damages it sustained as a proximate result of defendant's breach of contract?

You are instructed that the damages must have been a reasonably foreseeable result of the breach.

Answer in dollars and cents or zero.

ANSWER: $300,000.00

Interrogatory Number 10:

Do you find from a preponderance of the evidence that the conduct of Crawford in its performance of the contract constituted negligence?

Answer: "We do" or "We do not"

ANSWER: "We do"

If you have answered Interrogatory Number 10 "We do", then answer Interrogatory Number 11; otherwise, do not answer Interrogatory Number 11.

Interrogatory Number 11:

Do you find from a preponderance of the evidence that such negligence was a proximate cause of plaintiff's damages?

Answer: "We do" or "We do not"

ANSWER: "We do"

If you have found, as to any of the items listed in Interrogatory Number 7, that defendant breached the contract, that such breach was a proximate cause of plaintiff's damages, and that such damage was a reasonably foreseeable result of the breach, and if you have answered Interrogatory Number 11 "We do", then answer Interrogatory Number 12; otherwise, do not answer Interrogatory Number 12.

Interrogatory Number 12:

What percentage of plaintiff's damages, if any, was caused by defendant's breach of contract and plaintiff's negligence?

Answer:

Defendant's breach of contract.	75%
Plaintiff's negligence.	25%
Total	100%

Interrogatory Number 13:

Do you find from a preponderance of the evidence that defendant was negligent in any of the following respects, and that such negligence was a proximate cause of plaintiff's damages, if any?

	Negligence	Proximate Cause
A) Failing to schedule the work so that Crawford could complete its work on or before its contractual deadline;	"We do not"	"We do not"
B) Failing to coordinate the work of Crawford with the work of other subcontractors;	"We do"	"We do"
C) Failing to make work areas available to Crawford so that Crawford could perform its work in a logical sequence and in conformity with the schedule;	"We do not"	"We do not"
D) Failing to keep Crawford timely informed of all scheduling, rephasing and changes;	"We do"	"We do"

E) Failing to request that Crawford submit prices for changed work as change order requests from the Corps of Engineers affecting Crawford's work were received by Bateson;	"We do"	"We do"
F) Failing to consult with Crawford on changes which affected Crawford's work and failing to keep Crawford apprised of negotiations with the Corps for time or money relating thereto;	"We do"	"We do"
G) Failing to pay Crawford for extra work and change order work;	"We do not"	"We do not"
H) Failing to make progress payments to Crawford covering the work performed.	"We do not"	"We do not"

If you have found that, in any of the above respects, defendant was negligent and that such negligence was a proximate cause of plaintiff's damages, then answer

Interrogatory Numbers 14 through 17; otherwise, do not answer Interrogatory Numbers 14 through 17.

Interrogatory Number 14:

As to each element for which you have found negligence and proximate cause, you must find by a preponderance of the evidence whether the act or omission occurred prior to March 28, 1983 and, if it did, whether Bateson fraudulently concealed from Crawford the facts upon which the particular negligence is based or whether Bateson induced Crawford to postpone the filing of this lawsuit until more than two years after the occurrence of the particular negligence. For Bateson to be guilty of fraudulent concealment, it must have had actual knowledge of the facts concealed and a fixed purpose to conceal the negligence. For

Bateson to have induced Crawford to postpone the filing of this lawsuit, Bateson must have misrepresented facts upon which Crawford reasonably relied in postponing legal action.

Defendant has the burden of proving whether the act or omission occurred prior to March 28, 1983. Plaintiff has the burden of proving fraudulent concealment or inducement.

	Prior to March 28, 1983	Fraudulently Concealed or Induced
A)	-	-
B)	"We do"	"We do not"
C)	-	-
D)	"We do"	"We do"
E)	"We do"	"We do"
F)	"We do"	"We do"
G)	-	-
H)	-	-

Interrogatory Number 15:

What amount of money, if paid now in cash, do you find from a preponderance of the evidence would compensate plaintiff for the damages, if any, it sustained as a proximate result of defendant's negligence?

Answer: Answer in dollars and cents or zero.

ANSWER: $208,000.00

If you have found, in any of the above respects, that defendant was negligent and that such negligence was a proximate cause of plaintiff's damages, and if you have answered Interrogatory Number 11 "we do", then answer Interrogatory Number 16; otherwise, do not answer Interrogatory Number 16; otherwise, do not answer Interrogatory Number 16.

Interrogatory Number 16:

What percentage of plaintiff's damages, if any, was proximately caused by the negligence of each of the parties?

Answer:	J.W. Bateson Company	60%
	Crawford Painting and Drywall Company	40%
	Total	100%

Interrogatory Number 17:

Do you find from a preponderance of the evidence that defendant's conduct constituted gross negligence?

Answer: "We do" or "We do not"

ANSWER: "We do not"

Interrogatory Number 18:

Do you find from a preponderance of the evidence that defendant violated section 1962(c) of the RICO statute, and that such violation was a proximate cause of injury or damage to plaintiff in his business or property?

Answer: "We do" or "We do not"

Violated of Section
1962(c) "We do not"

Proximate cause _____

Interrogatory Number 19:

Do you find from a preponderance of the evidence that defendant violated section 1962(a) of the RICO statute, and that such violation was a proximate cause of injury or damage to plaintiff in his business or property?

Answer: "We do" or "We do not"

Violated of Section
1962(c) "We do not"

Proximate cause _____

Interrogatory Number 20:

As to any violation of section 1962 which you have found to be a proximate cause of injury or damage to plaintiff in his property or business, you must find by a preponderance of the evidence

whether the violation occurred prior to March 28, 1983 and, if it did, whether Bateson fraudulently concealed from Crawford the facts upon which the violation is based or whether Bateson induced Crawford to postpone the filing of this lawsuit until more than two years after the occurrence of the violation. For Bateson to be guilty of fraudulent concealment, it must have had actual knowledge of the facts concealed and a fixed purpose to conceal the violation. For Bateson to have induced Crawford to postpone the filing of this lawsuit, Bateson must have misrepresented facts upon which Crawford reasonably relied in postponing legal action.

Defendant has the burden of proving whether the violation occurred prior to March 28, 1983. Plaintiff has the burden of proving fraudulent concealment or inducement.

Answer: "We do" or "We do not"

Violation prior to March 28, 1983.	"We do not"
Fraudulent concealment or inducement.	_____

Interrogatory Number 21:

What amount of money, if paid now in cash, do you find from a preponderance of the evidence would compensate plaintiff for the injury or damage, if any, to his business or property, which was the proximate result of defendant's violation of section 1962?

Answer in dollars and cents or zero.

ANSWER: 0

Interrogatory Number 22:

What amount of money, if any, do you find from a preponderance of the evidence plaintiff should recover against defendant as punitive damages?

Answer in dollars and cents or zero.

ANSWER: $4,000,000.00

Interrogatory Number 23:

What amount of money, if any, do you find from a preponderance of the evidence should plaintiff recover in the form of reasonable and necessary attorneys fees for work expended in the preparation and trial of this cause?

Answer in dollars and cents or zero.

ANSWER: $730,000.00

Interrogatory Number 24:

Do you find from a preponderance of the evidence that Crawford breached the subcontract and/or the Liquidation Agreement by bringing this lawsuit without fully pursuing its claim through Bateson against the Corps of Engineers?

Whether Crawford failed to fully pursue its claim against the Corps and whether it constituted a breach of con-

tract is for you to determine. Bateson has the burden of proof on this interrogatory and the next one.

Answer: "We do" or "We do not"

ANSWER: "We do not"

If you have answered Interrogatory Number 24 "We do", then answer Interrogatory Number 25; otherwise, do not answer Interrogatory Number 25.

Interrogatory Number 25:

What amount of money do you find from a preponderance of the evidence would compensate Bateson for the damages, if any, it suffered, as a result of Crawford's breach?

In considering Bateson's attorneys' fees as damages, you should consider the factors set forth in the instructions previously given to you.

Answer in dollars and cents or zero.

ANSWER: $ 0

APPENDIX B

A G R E E M E N T

THIS AGREEMENT is made and entered into as of the 15th day of June, 1982, by and between J.W. Bateson Company, Inc. (hereinafter "Bateson") and its Subcontractors on the Wilford Hall Area Medical Center, Lackland AFB, Texas, Project who elect to become signatory to this Agreement (hereinafter "Subcontractors"):

RECITALS

WHEREAS, on or about September 29, 1976, Bateson entered into Contract No. DACA63-76-C-0271 for the construction and rehabilitation of certain buildings at the Wilford Hall Area Medical Center, Lackland Air Force Base, Texas, (hereinafter "the Prime Contract") with the U.S. Army Corps of Engineers (hereinafter "Owner"); and,

WHEREAS, Bateson and its Subcontractors have encountered serious delays, acceleration, impact costs and other related costs because of actions and inactions of the Owner;

WHEREAS, Bateson and its Subcontractors signing this Agreement find it to their mutual best interest to cooperate in presenting their claims jointly to the Owner for additional compensation;

WHEREAS, Bateson and its Subcontractors signing this Agreement desire to establish the rights and obligations of all parties to this Agreement so that their claims may be presented to their mutual advantage to the Owner.

NOW THEREFORE, Bateson and its Subcontractors signing this Agreement do hereby agree as follows:

1. Bateson and said Subcontractors recognize the relationship of trust and confidence established between them by this Agreement. Bateson and said Subcontractors will fully, completely and without reservation share all information and records, each with the other relating to this claim, so that an accurate and complete claim presentation for the Owner's consideration may be made.

2. Bateson will take the functional lead in submitting the total delay claim to the Corps of Engineers. Said Subcontractors and Bateson, however, are each to be separately responsible for the

accumulation, preparation and presentation of their particular entitlement and cost data.

3. Bateson and said Subcontractors shall be entitled to receive for their respective claims any amount which the Owner, an Appeals Board or a Court may separately designate as the amount to which each is entitled. However, in the event no separate designation is established and in anticipation of such an event, said Subcontractors and Bateson agree that they will attempt to reach an agreement on the amounts to be paid to each. In the event the parties are unable to agree, then Bateson and said Subcontractors shall share in any overall

lump sum recovered in the same ratio and proportion as its claim bears to the total dollar amount of the claims actually presented to the Owner unless any claim or claims are so grossly exaggerated that this approach would be unfair to the other claimants. In such event, exaggerated claims will be adjusted to fair and equitable amounts by Bateson whose determination as to this adjustment shall be final and conclusive.

4. In the event any party is unwilling to accept an offer and settlement or a judgment, then said party or parties shall have the right to proceed further. However, in such event, the entire

cost of such further proceedings shall be borne by the party or parties so desiring to proceed to prosecute their claims further. The proceeding party or parties shall hold the other parties harmless from any loss or diminution of the amount the said other parties have indicated they are willing to accept without proceeding further.

5. Bateson agrees that any funds it receives from the Owner as a result of claims of Subcontractors presented pursuant to this Agreement shall be paid immediately upon receipt to the proper Subcontractor to the extent of the Subcontractor's interest therein and the Subcontractor

shall, in turn, and in the same manner, make payments to its subcontractors and suppliers to the extent of their respective interests therein.

6. In the event the claim is not settled at the district level, requiring an appeal to the Armed Services Board of Contract Appeals and/or the United States Court of Claims or other appropriate forum, Bateson may retain outside counsel to prosecute such appeal on behalf of all of the parties to this Agreement desiring to participate in such appeal. All participating parties will be advised periodically of expenses incurred, and their concurrence will be requested for

all proposed major or significant expenditures. Accordingly, it is agreed that the parties signing this Agreement who desire to appeal will share the expenses of prosecuting such appeal in the same ratio that the ultimate recovery that each of their claims bears to the total ultimate recovery. Bateson will advance funds for expenses; however, when Bateson considers it appropriate, it will invoice each participating Subcontractor for contribution to a funding pool on a pro-rata basis determined by Subcontractor amounts. The final adjustment on sharing of expenses will, however, be made on the ratio of ultimate recovery as provided above.

7. In view of the mutual interest of the parties hereto, Bateson and the Subcontractors signing this Agreement agree to waive any right each may have against the other arising out of any facts constituting the basis of the claim presented to the Owner other than as to moneys collected from the Owner on such claims. Such waivers do not, however, affect the rights of the parties under the Subcontracts now existing between them as to performance, warranties, progress payments, balance of contract price, performance and payment bonds, retention, changes and extras ordered by the Owner. It is understood that this Agreement does not apply to other claims

for extras, changes or other types of claims against the Owner which are already covered by provisions under Subcontracts now existing.

8. It is further understood and agreed that the Subcontractors not signing this Agreement shall have no right to material prepared pursuant to this Agreement for the purpose of presenting a claim to the Owner without said Subcontractor paying his pro-rata share of the shared cost as outlined herein.

IN WITNESS WHEREOF the parties have caused this Agreement to be executed in multiple counterparts, each of which

shall be considered an original, as of the date and year first written above.

J.W. BATESON COMPANY INC.

By: _____
C. Ray Higgins
Vice President

SUBCONTRACTOR

CRAWFORD PAINTING & DRYWALL CO.

_____

_____
Johnny Crawford

APPENDIX C

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 87-5545

CRAWFORD PAINTING & DRYWALL COMPANY,

Plaintiff-Appellee

vs.

J. W. BATESON, INC.,

Defendant-Appellant

SUGGESTION FOR REHEARING BY THE PANEL

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On Brief:

Mary Ann Ingberg
Owen J. Shean
William B. Fisher

Certificate of Interested Persons
Pursuant to Local Rule 35.2.1

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualifications or recusal.

J. W. Bateson Company, Inc., Dallas, Texas, Defendant-Appellant

Centex Corporation, Dallas, Texas, Parent Corporation of J. W. Bateson Company, Inc.

W. T. Crawford, Sr., Iowa Park, Texas, Owner of Crawford Painting & Drywall Company, a Sole Proprietorship

Johnny Crawford, Iowa Park, Texas, Manager of Crawford Painting & Drywall Company

Crawford Painting & Drywall Company, Iowa Park, Texas, Plaintiff-Appellee

First Republic Bank -- Wichita Falls, Wichita Falls, Texas as Successor by Merger to InterFirst Bank - Wichita Falls.

Jerry P. Jones, G. Luke Ashley, Madeleine B. Johnson, Thompson & Knight, Attorneys for Appellant

Jon M. Wickwire, Wickwire, Gavin & Gibbs, P.C., Vienna, Virginia, Attorney for Appellee

Jon M. Wickwire
Attorney of Record for
Plaintiff-Appellee, Crawford
Painting & Drywall Company

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STATEMENT OF THE ISSUES

In support of the Appellee's Suggestion of Rehearing by the Panel, the Appellee notes the following issues:

1. The panel erroneously held that the existence of a fiduciary relationship was essential to Crawford's cause of action for fraud.

2. The panel ignored substantial evidence regarding Modification P00253 and misconstrued its effect.

3. The panel ignored substantial evidence and misapplied the law regarding the "no damages for delay" clause.

4. The panel ignored the jury's findings and the evidence concerning fraudulent concealment of the causes of action and incorrectly applied the statute of limitations.

ARGUMENT

I. A FIDUCIARY RELATIONSHIP IS NOT NECESSARY TO ESTABLISH FRAUD

The panel misconstrued Texas and Fifth Circuit law when it held that the purported absence of a fiduciary relationship between the parties was fatal to Crawford's fraud claim. Texas law recog-

nizes four other circumstances in which a statement or action may be fraudulent in the absence of a fiduciary duty: (1) a positive misstatement; (2) active concealment of facts; (3) failure to correct earlier statements once the speaker learns of the statement's falsehood; and (4) partial statements that create a false impression.

The record is replete with instances of affirmative misstatements. Crawford introduced the subcontract between the parties which contains a "changes" clause which requires Bateson to either (1) enter into a written agreement which authorizes a change order prior to the start of the work, or (2) to issue a direction to proceed with changes in the work with an agreement as to cost to be determined later. (Ex. 58) To fulfill its obligation, Bateson was required to

advise Crawford of changes to the work, but; it did not do so. Bateson entered into this subcontract despite the fact that it adhered to a corporate policy of not disclosing time extensions to its subcontractors. (R. IX 112-13). When Bateson executed the subcontract, it did not intend to disclose change orders that enlarged performance time. In light of this corporate policy, the subcontract constituted a misrepresentation sufficient to satisfy three elements of a fraud claim: representation, falsity, and knowledge of falsity. Further, Bateson intended Crawford to rely upon Bateson's promise to provide change order information, and Crawford relied on Bateson's original and subsequent representations concerning change orders. (R. II 55, 79-80, IV 50-51, 112). Finally, Crawford was damaged by his reliance on

Bateson's misrepresentation. (R. II 55, 79-80, 89).

After work began, Mr. Higgins, Bateson's project manager, promised that he would supply Crawford with copies of all change orders. (R. II 55, IV 50-51). When he made this statement, Mr. Higgins did not intend to disclose the change order that resequenced the work, extended completion time by two years and released claims: Modification P00253 (R. IX 112-13). Mr. Higgins intended Crawford to believe that he would receive all change orders and, in fact, Crawford, acted in reliance, and was severely damaged. (R. II 89).

After P00253 was signed, Mr. Higgins, on several occasions, told Crawford that he was behind schedule and ordered manpower increases. When Mr. Higgins made these statements, he knew that the

project had been rephased and that Crawford was not behind the new schedule. Nonetheless, he demanded that Crawford accelerate his work to catch up to a defunct schedule. (Ex. MMM: Ex. PPP). In reliance on these statements, Crawford increased his manpower at tremendous cost. In 1982, Don Smith, Bateson's Project Manager, told Crawford that all days of delay were compensable when Bateson knew that all time prior to 1979 was released. (R.IV 137). Bateson's misstatements and Crawford's reliance and resultant injury were sufficient to establish Crawford's fraud claim.

The panel also failed to consider Bateson's multiple acts of active concealment. Concealment of a material fact constitutes a misrepresentation without regard to the existence of a fiduciary relationship. Campbell v. Booth, 526

S.W.2d 167 (Tex. Civ. App. 1975), and see, Chemetron Corporation v. Business Funds, Inc., 682 F.2d 1149 (5th Cir. 1982) vacated and remanded on other grounds, 460 U.S. 1007 (1983). The jury found Bateson liable for multiple acts of concealment. Bateson concealed the release language of P00253 at the time it was negotiated. (Inter. No. 3(9)). The jury also found that in 1982 Bateson continued to conceal the bilateral modification. (Inter. No. 3(11)). The "time extension by phase" document (Ex. 88) that was transmitted to the subcontractors did not mention that claims prior to 1979 were released. In that document, Bateson referred to the rephasing with a "PR" designation rather than the official designation for the bilateral modifica-

tion, P00253.[1] (Ex. 88) When it disseminated the time extension document, Bateson claimed that it had made full disclosure of all facts concerning the claim. (Inter. 3(13)) Bateson actually hid the fact that three years earlier it had executed a modification rephasing the project with new completion dates. Bateson also concealed the Corps' position that P00253 released claims prior to 1979. (Inter. No. 3(17)). Finally, the jury found that Bateson concealed the release language until August 1984. (Inter. 3(23); See Ex. 471, 472, 487; R. V 323-25.)

Bateson's acts of concealment were not limited to P00253. The jury also

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1/ Use of Bateson's "PR" designation for proposals, rather than the Corps change order designation "P00," led Crawford to believe that the Corps had not issued a change order.

found that Bateson maintained secret schedules and concealed time extensions granted by the Corps. (Inter. No. 3(3)). To ensure that the subcontractors would not learn of time extensions, Bateson instructed the Corps not to disclose them. (R. V 323-325; Ex. 472; Ex. 487). The record contained ample evidence to support the findings of active concealment.

The panel failed to consider Texas authority holding that nondisclosure can amount to fraud notwithstanding the absence of a fiduciary relationship. Susanoil, Inc. v. Continental Oil Co., 519 S.W.2d 230 (Tex. Civ. App. 1975). Susanoil holds that when one makes a statement that he later learns to be false he has a duty to correct his misstatement if the recipient has relied on the statement. Bateson told the subcon-

tractors in 1982 that all claims were open and could be submitted to the Corps. The jury found that in 1983 Bateson concealed the Corps' position that P00253 foreclosed any compensation for claims arising before 1979. Once it knew of the Corps' position, Bateson had a duty to correct its misstatement. Bateson intended the subcontractors to believe that the Corps would compensate them for their costs. Crawford relied on Bateson's misrepresentation and continued work on the project.

The panel also ignored case law holding that a duty to disclose arises in a non-fiduciary context when the speaker has made an incomplete and deceptive disclosure. Southeastern Financial Corp. v. United Merchants & Mfrs., 701 F.2d 565 (5th Cir. 1983). Bateson supplied Crawford with computer generated trade sorts

which stated the percentage of work completed for progress payment purposes. However, Bateson cut the sorts in half before supplying them to Crawford, deleting information on the current project progress as related to contract completion dates. (Ex. 116; Ex. GGGGGG). Had Bateson not deleted these columns, Crawford could have discovered the new contract completion date and might have discovered the new schedule and its origin. By failing to provide the entire printout Bateson breached the duty it undertook when it provided the partial trade sort.

By confining itself to a consideration of the existence of a fiduciary relationship, the panel failed to consider the other forms of misrepresentation. Had the panel considered misstatements, concealment and non-fiduciary

nondisclosure, it would have been apparent that the jury was entitled to find that Bateson was guilty of many fraudulent misrepresentations. By erroneously ending its analysis with the fiduciary duty issue, the court failed to consider the ample evidence presented to establish the other elements of the cause of action.

II. THE PANEL MISCONSTRUED P00253

The panel grossly understated the effect and significance of P00253, and in so doing ignored substantial evidence. The panel asserted that "P00253 did not change the construction; it only incorporated prior time extensions because of prior change orders. We fail to see any effect of this agreement upon Crawford, but if there was any relation to Crawford's work, it would be by causing some

extra delay." In fact, P00253 was a fundamental change to the project.

P00253 accomplished three objectives: (1) it totally resequenced the project; (2) it extended the project by an extraordinarily long period; and (3) it released a majority of claims that subcontractors might otherwise have recovered from the Corps. The panel did not understand that this change was not mere "paperwork" but in fact was of critical importance to all subcontractors on the construction project, as all aspects of their work were dramatically affected. Further, the panel failed to note that Crawford was not provided with notice of any of the time extensions included in the prior changes. (R. II 79) Thus, assuming arguendo that P00253 only incorporated prior changes, Crawford was not apprised of them either, and the

cumulative effect would still have been extremely onerous.

P00253 totally resequenced or rephased the project, so that subcontractors were compelled to abandon all of their existing schedules to conform to a completely new sequence of work. Numerous witnesses agreed that the effect was essentially a "start over" or new beginning for the project. (See R. III 491; R. IV 64-66, 69, 149, 175-176, 210; R. VI 156-158; R. IX 78-80, 136-143; Ex. 473). The rephasing resulted in substantial unforeseen increases in Crawford's costs. Further, P00253 extended the project by approximately two years, as has been admitted by Bateson. (See Ex. 88) The time extension was authorized only in P00253, and not in any other change order.

In addition, P00253 released all claims which Crawford might have asserted against the Corps for changes prior to April 13, 1979, as well as all delays and impact costs associated with the change order itself. (April 13, 1979 was the date of the formal negotiation meeting between the Corps and Bateson). Bateson later sent a letter with the executed copy of P00253 which purported to reserve claims for costs associated with 148 days of the extension caused by the Corps. The panel apparently interpreted the letter as part of the agreed upon change order. However, facts adduced at trial controvert this interpretation. Several witnesses testified that the quid pro quo for the release, the resequencing and the extended performance time was the Corps' surrender of its right to approximately $750,000 in liquidated damages owed by

Bateson. (R. V 377; VI 155-159). Since the release was the principal benefit accruing to the Corps, the fact that just six (6) days after the negotiation meeting the Corps issued the Notice to Proceed (without any reservation of 148 days) (Ex. 8A) demonstrates that the Corps and Bateson had already agreed to the release without reservation. The trial court and jury concluded that a release was intended.

Even if the 148 day reservation were effective, the release still wiped out most of Crawford's delay, impact and other claims. As the time extension by phase document demonstrates, P00253 extended the project schedule by substantially more than 148 days. (Ex. 88). Thus the panel clearly erred when it stated, without any reference to the evidence, that by virtue of the cover

letter, "Bateson specifically reserved all rights for increased costs for prior delay." On its face, the cover letter reserved only claims for 148 days of delay. Further, the letter attempted no reservation for the impact (lost efficiency or disruption) of the change order. Finally, even if P00253 were not a release as the panel apparently believed, Crawford was nonetheless severely damaged by the concealment of the Corps position regarding the release agreement. (Inter. No. 3 (17))

In contrast to the panel's trivialization of P00253, Bateson's President wrote that the change order "rephased the entire project" (Ex. 473). In the construction industry, such a rephasing constitutes a fundamental change. P00253 forced Crawford to perform a contract which was materially different from the

contract to which Crawford had agreed, and effectively imposed a "cardinal change" upon Crawford.[2] Bateson had a duty to inform Crawford of the change, including the release language, in order to allow Crawford to determine whether to renegotiate the contract to obtain a fair price (R. IX 78-79), abandon the project (R. VIII 22, 60), or consider other legal recourse. Bateson's duty to inform Crawford of the change was established by expert testimony which the jury was entitled to believe. (R. IX 78-79).

III. DAMAGES

The panel's treatment of the damages issues reflects errors of fact and law.

2/ (A cardinal change is one which is outside the scope of the original contract. General Dynamics Corporation v. United States, 585 F.2d 457 (Ct. Cl. 1978).)

The panel simply gave effect to the "no damages for delay clause" included in Paragraph 9 of the subcontract without any discussion of the facts, the jury instructions, or the cited case law regarding the well recognized exceptions to the enforceability of such clauses.

The opinion did nothing more than to identify, without analysis, the case of E. C. Ernst, Inc. v. Manhattan Constr. Co. of Tex., 551 F.2d 1026, 1029 (5th Cir. 1977), reh'g denied in part, granted in part, 559 F.2d 268 (5th Cir. 1977); cert. denied 434 U.S. 1067 (1978). This Court specifically recited in E. C. Ernst the exceptions to the enforceability of no damages for delay clauses. Id. at 1029. Such exceptions have long been recognized in Texas. See, e.g., Housing Authority of the City of Dallas v. Hubbell, 325 S.W.2d 880 (Tex. Civ. App.

1959) The trial court's charge in this case addressed the exceptions and properly left this factual determination to the jury. (R. XI 169-170).[3]

Crawford presented ample evidence that the exceptions should govern this case. First, Crawford demonstrated that Bateson caused project delay. (R. II 67-69, 74-84; VI 157-158; VIII 228; IX 9-14, 129). The panel's decision implicitly recognizes that Bateson caused delay. The panel accepted the jury finding that Bateson had breached the contract by failing to coordinate the

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3/ In addition, the panel failed to address the effect of the subcontract clause incorporating by reference the benefits and duties established under the prime contract. (Ex. 58, para. 1) The prime contract allows for recovery of delay damages, and entitles the contractor to an equitable adjustment for delays. The jury was properly instructed on this issue. (R. XI 167-169).

work, which in turn caused delay. In addition, evidence was presented, including admissions by Bateson officers, demonstrating that Bateson had delayed the project by failing to timely complete the concrete work that had to precede Crawford's work. (R. VIII 228; IX 129). Second, Bateson was guilty of bad faith, as the jury's findings abundantly demonstrate. (Inter. Nos. 3, 8, and 14). Bateson's bad faith conduct caused delay, as Crawford's ability to plan and schedule his work was severely affected by Bateson's policy of concealing the overall schedule, time extensions, and interim changes. (R. IV 175-176). Third, it cannot be disputed that the delay of approximately 2 years was not contemplated by the parties. (R. IX 74-79). Finally, ample evidence, including expert testimony, was presented

that the delay was such that Crawford would have been justified in abandoning the project. (R. II 132; IV 149; IX 78-79).

The disturbing result of the decision is apparent: it would allow the prime contractor first to strike a secret deal with the owner releasing he owner of liability for delays, and then to turn around and enforce the no damages for delay clause against the innocent subcontractor. Surely the prime contractor must be estopped from hiding behind the no damages clause where the prime has released the only other party against whom the subcontractor might have recovered.

As this Court states in E. C. Ernst, the no damages for delay clause must be interpreted strictly against the party seeking to avoid liability. Id. at 1029.

The panel's opinion, seen in this light, is particularly difficult to understand. The opinion asserts, utterly without any reference to the evidence, that all of the alleged damages were for delay. However, Crawford put on extensive evidence of other kinds of damages. For example, Crawford put on evidence of more than $466,000 in damages for lost productivity, lost efficiency, and disruption, and more than $81,000 in lost profits. (R. II 56-57, 88-89; III 290, 294-296, 301). In addition, Crawford proved substantial damages for the cost of borrowing, which cannot all be characterized as delay damages. (R. II 302)

The jury was instructed that if the exceptions to the no damage for delay clause did not apply, no award should be made for delay. Since the breach of

contract award was in the amount of $300,000, it is possible that the jury based the award solely on proof of lost productivity, lost efficiency, disruption, lost profits, and costs of borrowing, and that no amount was included for delay. Thus, as the award may be fully supported by the non-delay damages proven at trial.

Finally, the panel agrees with the jury that Bateson committed fraud in 1982 when it failed to disclose P00253. The opinion incorrectly states that the only damages recoverable for this fraud would be the incremental increase in Crawford's claim preparation costs. P00253 was a cardinal change such that, had Bateson not committed fraud, Crawford would have been informed of P00253 and would have been justified in abandoning the project. Had Crawford been permitted to exercise

this right, he could have avoided major construction costs and substantial costs of borrowing.[4] As in other instances, the opinion inexplicably trivializes the findings of the jury and fails to correctly apply the law to the facts.

4/ The panel acknowledged that Bateson breached the Liquidation Agreement and committed fraud, and states that Crawford's only damages flowing from these wrongful acts would have been an increase in claim preparation costs. The panel also suggests that the jury tried to "manufacture" such damages in awarding $30,000.00 for the breach of the Liquidation Agreement, asserting that no proof of such damages was offered at rial. Such conclusions are directly contrary to the evidence. Crawford put on specific evidence that his claim preparation costs were approximately $35,000.00 - a figure that only slightly exceeds the jury's award. (Ex. 15, pages 35-36; Ex. 446, page 36). Because Crawford had to completely revise his claim when he learned about P00253, all preparation costs for the revised claim should be recoverable. The panel had no basis for dismissing the judgment as to the breach of the Liquidation Agreement. Further, since this judgement must be

(Footnote 4 Continued on Next Page)

IV. STATUTE OF LIMITATIONS DOES NOT BAR CRAWFORD'S BREACH OF CONTRACT AND NEGLIGENCE CLAIMS

The panel ruled that Crawford did not present sufficient evidence to establish the estoppel effect of fraudulent concealment of Crawford's breach of contract and negligence claims. The panel ignored the evidence that Bateson was Crawford's only source of information concerning changes and that Crawford repeatedly requested Bateson to provide full information. Bateson instructed the Corps not to disclose time extensions to the subcontractors. The Corps and Bateson worked from a schedule that was kept

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(Footnote 4 Continued From Previous Page) sustained, Crawford's attorney's fees should be awarded pursuant to Article 2226 of Vernon's Annotated Texas Code Supplement, which provides for the award of attorney's fees in breach of contract cases. Finally, since the panel agreed that Bateson committed fraud in this regard, an award of punitive damages would be proper.

secret from the subcontractors. Crawford had no other source of information concerning changes to the contract. Early in the project Bateson promised to provide all change orders; it did not do so. Not until shortly before the trial date did Crawford received a copy of Bateson's log that enumerated the changes. Knowledge that the work was not progressing in accordance with the original schedule was not sufficient to cause Crawford to suspect that there had been a fundamental change in the contract and a release of all claims prior to 1979. Once Bateson fraudulently concealed the change, it was estopped to claim that Crawford did not complain in a timely manner.

Bateson's repeated assurances as to the availability of recovery from the Corps, while not disclosing the release, constituted active concealment and ex-

cused any failure to exercise diligence in discovering the falsity of the statement. Stafford v. Wilkinson, 304 S.W.2d 364 (Tex. 1957) Perhaps the most striking example of reassurance that all claims were open was the execution of the liquidation agreement. In that agreement, Bateson promised to share all claim-related information with the subcontractors. Once Bateson agreed to share information, Crawford was excused from further inquiry, and Bateson was estopped from asserting the limitations defense.

Assuming arguendo that there was no fraudulent concealment of the Crawford's breach of contract claim, Crawford's suit was nonetheless timely filed. Texas courts have held that a cause of action does not accrue in a continuing contract situation until the contract performance

is completed. Godde v. Wood, 509 S.W.2d 435 (Tex. Civ. App. 1974); Alexander & Polley Const. Co. v. Spain, 477 S.W.2d 301 (Tex. Civ. App. 1972). This principle is applicable where a claim for

> work, labor, or materials performed or furnished is the outgrowth of the entire contract for continuous work, labor or materials (until the work project has been completed), the claim will be treated and considered as an entire demand and limitations will not commence to run until the contract has been finished. Goode at 441.

Crawford and Bateson contemplated a continuing contract, one that was to continue until the renovation and improvement of the hospital was complete. As the panel noted, Crawford's work on the project was not completed until August, 1983. Therefore, the suit was timely filed in March 1985.

CONCLUSION

For the foregoing reasons, the Appellee respectfully requests that rehearing by the panel be granted.

Respectfully submitted,

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Certificate of Service

I hereby certify that I caused a true copy of the foregoing Suggestion for Panel Rehearing to be served upon counsel for Appellant this 23rd day of August, 1988 by Federal Express.

Jon M. Wickwire

APPENDIX D

STATUTORY PROVISIONS

§ 270a. Bonds of contractors of public buildings or works

(a) Type of bonds required

Before any contract, exceeding $25,000 in amount, for the construction, alteration, or repair of any public building or public work of the United States is awarded to any person, such person shall furnish to the United States the following bonds, which shall become binding upon the award of the contract to such person, who is hereinafter designated as "contractor":

(1) A performance bond with a surety or sureties satisfactory to the officer awarding such contract, and in such amount as he shall deem adequate, for the protection of the United States.

(2) A payment bond with a surety or sureties satisfactory to such officer for the protection of all persons supplying labor and material in the prosecution of the work provided for in said contract for the use of each such person. Whenever the total amount payable by the terms of the contract shall be not more than $1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than $1,000,000 and not more than $5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the con-

tract. Whenever the total amount payable by the terms of the contract shall be more than $5,000,000 the said payment bond shall be in the sum of $2,500,000.

(b) Waiver of bonds for contracts performed in foreign countries

The contracting officer in respect of any contract is authorized to waive the requirement of a performance bond and payment bond for so much of the work under such contract as is to be performed in a foreign country if he finds that it is impracticable for the contractor to furnish such bonds.

(c) Authority to require additional bonds

Nothing in this section shall be construed to limit the authority of any

contracting officer to require a performance bond or other security in addition to those, or in cases other than the cases specified in subsection (a) of this section.

(d) Coverage for taxes in performance bond

Every performance bond required under this section shall specifically provide coverage for taxes imposed by the United States which are collected, deducted, or withheld from wages paid by the contractor in carrying out the contract with respect to which such bond is furnished. However, the United States shall give the surety or sureties on such bond written notice, with respect to any such unpaid taxes attributable to any period, within ninety days after the date when such contractor files a return for such period, except that no such notice shall be

given more than one hundred and eighty days from the date when a return for the period was required to be filed under Title 26. No suit on such bond for such taxes shall be commenced by the United States unless notice is given as provided in the preceding sentence, and no such suit shall be commenced after the expiration of one year after the day on which such notice is given.

§ 270b. Rights of persons furnishing labor or material

(a) Every person who has furnished labor or material in the prosecution of the work provided for in such contract, in respect of which a payment bond is furnished under sections 270a to 270d of this title and who has not been paid in full therefor before the expiration of a period of ninety days after the day on which the last of the labor was done or

performed by him or material was furnished or supplied by him for which such claim is made, shall have the right to sue on such payment bond for the amount, or the balance thereof, unpaid at the time of institution of such suit and to prosecute said action to final execution and judgment for the sum or sums justly due him: *Provided, however,* That any person having direct contractual relationship with a subcontractor but no contractual relationship express or implied with the contractor furnishing said payment bond shall have a right of action upon the said payment bond upon giving written notice to said contractor within ninety days from the date on which such person did or performed the last of the labor or furnished or supplied the last of the material for which such claim is made, stating with substantial accur-

acy the amount claimed and the name of the party to whom the material was furnished or supplied or for whom the labor was done or performed. Such notice shall be served by mailing the same by registered mail, postage prepaid, in an envelope addressed to the contractor at any place he maintains an office or conducts his business, or his residence, or in any manner in which the United States marshal of the district in which the public improvement is situated is authorized by law to serve summons.

(b) Every suit instituted under this section shall be brought in the name of the United States for the use of the person suing, in the United States District Court for any district in which the contract was to be performed and executed and not elsewhere, irrespective of the amount in controversy in such suit, but

no such suit shall be commenced after the expiration of one year after the day on which the last of the labor was performed or material was supplied by him. The United States shall not be liable for the payment of any costs or expenses of any such suit.

§ 270c. Right of person furnishing labor or material to copy of bond

The department secretary or agency head of the contracting agency is authorized and directed to furnish, to any person making application therefor who submits an affidavit that he has supplied labor or materials for such work and payment therefor has not been made or that he is being sued on any such bond, a certified copy of such bond and the contract for which it was given, which copy shall be prima facie evidence of the contents, execution, and delivery of the

original. Applicants shall pay for such certified copies such fees as the department secretary or agency head of the contracting agency fixes to cover the cost of preparation thereof.

§ 270d. "Person" defined

The term "person" and the masculine pronoun as used in section 270a to 270d of this title shall include all persons whether individuals, associations, co-partnerships, or corporations.

APPENDIX E

APPENDIX E

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Plaintiff's Trial Exhibit 8

P00253 DO-9989(R)
Contract No. DACA63-76-C-0271
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III. Due to the foregoing changes, the contract price remains unchanged.

IV. Because of the foregoing changes, the contract time is changed as stated in the attached Schedule.

V. Release of Claims.

In consideration of the modification agreed to herein as complete equitable adjustments for the contractor's delay and scheduling claims, the contractor hereby releases the Government from any and all liability under this contract for further equitable adjustments attributable to such facts or circumstances

giving rise to the aforesaid claims, more particularly:

1. For all modifications listed on the attached sheet, DO-9989(R) dated 4 June 1979, the contractor withdraws the protest to the paragraphs which read: "This amount constitutes full and complete compensation for any and all costs related to this change order." and "It is understood and agreed that as a result of the foregoing changes, the contract time remains unchanged."

2. All requests for time extensions relating to claims by the contractor dated on or before 13 April 1979.

3. All time allowable because of delays due to other than normal or unusually severe weather through 2 March 1979.